Nos. 78-575, 78-597 and 78-604

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

INTERSTATE COMMERCE COMMISSION, ET AL.,
Petitioners,

v.

SEABOARD ALLIED MILLING CORP., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENTS SEABOARD ALLIED MILLING CORP., ARCHER DANIELS MIDLAND COMPANY, ADM MILLING CO., CONAGRA, INC., DIXIE-PORTLAND FLOUR MILLS, INC., SOUTHEASTERN POULTRY AND EGG ASSOCIATION AND STATES OF NORTH CAROLINA AND INDIANA

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OPINIONS BELOW

The opinion of the Eighth Circuit (A. 303-316) is reported at 570 F.2d 1349.

The orders of the Interstate Commerce Commission (A. 284-285, 286-291) are not reported.

JURISDICTION

The judgment of the Eighth Circuit was entered on February 16, 1978. Rehearing *en banc* was sought but denied by order entered May 12, 1978. Upon application by petitioners, Mr. Justice Blackmun extended the expiration date for filing petitions for certiorari to October 9, 1978. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2350(a).

QUESTION PRESENTED

The Interstate Commerce Commission authorized for effectiveness rail rate increase tariffs containing violations of the long and short haul clause of section 4(1) of the Interstate Commerce Act over petitions to reject and protests citing the patent illegality of the tariffs. The Eighth Circuit Court of Appeals held that the Commission could not lawfully authorize such tariffs to become effective without adequately investigating and resolving the merits of the charges of patent illegality. The court remanded the case to the Commission for adequate investigation with detailed findings and conclusions based thereon with provision for refund of increased charges collected if the tariffs are found unlawful. The question presented for review is:

1. Whether the Eighth Circuit had jurisdiction to review the Commission's action under the unique circumstances of this case and the strict requirements of section 4(1).

STATUTES INVOLVED

Section 4(1) of the Interstate Commerce Act, the long and short haul clause, formerly 49 U.S.C. § 4(1), now 49 U.S.C. § 10726, is reproduced in the appendix to this brief at pages 1a-4a.[1]

[1] Reproduced in the appendix is 49 U.S.C. § 4(1) in effect at the time the decision below was entered, and the text of 49 U.S.C. § 10726, a recodification of section 4(1) without substantive change, adopted as of October 17, 1978, P.L. 95-473, 92 Stat. 1337.

STATEMENT

A. Identification of Respondents Submitting This Brief.

Respondents represent varied agricultural interests with a substantial stake in rail rates on grain and soybeans shipped to, from, and within the southeast. Some respondents[2] operate flour mills, grain elevators and/or feed and poultry and egg processing facilities in the southeast. Other respondents[3] represent thousands of farmers located in the states of Indiana and North Carolina who ship, receive, or merchandise grain or grain products moving by rail to, from, and within the southeast. All of these interests bear directly the effect of rail rate increases through higher transportation costs and/or lower prices.[4]

B. Statutory Background.

The rate increase tariffs at issue involve one of the oldest and one of the newest ratemaking sections of the Interstate Commerce Act. The long and short haul clause of section 4(1), 49 U.S.C. § 10726, originally enacted in 1887, is as old as the Act itself. Section 15(17), the seasonal (demand sensitive) rate provision, was enacted in 1976 by section 202(d) of the so-called 4-R Act, the Railroad Revitalization and Regulatory Reform Act of 1976, P.L. No. 94-210, 90 Stat. 36.

1. *The Fourth Section.*

As amended, the long and short haul clause, section 4(1), absolutely prohibits rail rates which are greater

[2] Seaboard Allied Milling Corp., Archer Daniels Midland Company, ADM Milling Company, ConAgra, Inc., Dixie-Portland Flour Mills, and Southeastern Poultry and Egg Association.

[3] States of Indiana and North Carolina.

[4] Under grain merchandising practices, farmers' market prices for their grain reflect rail rates.

for a shorter than for a longer distance over the same route in the same direction.[5] Only in "special" cases after application by the carrier and investigation by the Commission may a carrier be authorized to charge less for transportation over a longer than a shorter distance, subject to two limitations: the rate between the more distant points must be reasonably compensatory and where water competition is alleged in justification, such competition must be actual, not potential. 49 U.S.C. § 10726(b).

The statute contemplates that a carrier desiring "special" case authorization to depart from the prohibition submit application with or in advance of filing proposed rates and ". . . if the application is approved, the Commission shall allow the rate to become effective one day after the approval becomes effective." 49 U.S.C. § 10726(d).[6]

Aside from the "special" relief procedures of this section, the only other exception provided from its absolute prohibition is that a railroad operating over a circuitous line or route to or from a place in competition with another railroad operating over a more direct line or route may establish a rate, without a prior authorization, to meet the competition of the railroad operating over the more direct line or route.[7]

The Commission has adopted detailed regulations specifying the precise form of application for fourth section relief to be submitted in advance of rate effectiveness. Carriers are forewarned that where the application has

[5] The language of the fourth section is absolute and unqualified unlike other statutory rate standards. Compare sections 1(5), 2 and 3(1) of the Act, 49 U.S.C. § 10701(a), 10741(a)-(b).

[6] The statute also contemplates that the Commission "shall" commence a "special case" investigation upon receipt of application for relief submitted by the carrier.

[7] This limited exception is not at issue in this case.

not been acted upon prior to the tariff effective date, or where the special relief has been denied in whole or in part, the tariffs will be suspended "to avoid the unauthorized departures which otherwise would result". The rules further provide that if such a suspension occurs solely because of Commission failure to act upon the application, and relief is subsequently granted, the order of suspension will be vacated to allow the rates to become effective. 49 C.F.R. § 1301.65(b)(3)-(4).

When a rail carrier applies for section 4(1) relief, the application is published in the *Federal Register* and any interested party is afforded opportunity to protest and object. A copy of a typical recent Commission notice of a fourth section application is included in the appendix, pages 5a-6a. When relief is granted, the Commission issues an order granting such authority and its regulations require that the successful carrier applicant specifically state on the "title page of each tariff or supplement issued and filed under such authority" that the tariff contains fourth section departures specifically permitted by reference to the order which was issued, and such reference must appear by order number and date in connection with all tariff items containing the rates. 49 C.F.R. § 1300.28(a).

Thus, the standards and procedures for special relief from section 4(1)'s absolute prohibition are clear and well defined. The carriers and the Commission are well aware of their obligations under the strict requirements of the fourth section.

2. *Seasonal Rate Provision.*

The seasonal rate (demand sensitive) provision was added to the Interstate Commerce Act in 1976 by section 202(d) of the 4-R Act. Congress required that the Commission promulgate rules, standards and procedures for the establishment of rail rates based on seasonal,

regional or peak-period demand for rail services. Section 202(d), P.L. 94-210, formerly 49 U.S.C. § 15(17), now 49 U.S.C. § 10727. Pursuant to this Congressional mandate, the Commission in Ex Parte No. 324, *Standards and Expeditious Procedures for Establishing Railroad Rates Based On Seasonal, Regional, Or Peak Period Demand for Rail Service*, 355 I.C.C. 522 (1977), prescribed rules by which it stated it would be "guided" in considering whether or not to authorize rate proposals under section 15(17). 49 C.F.R. § 1109.10(e). One of these standards is whether, in response to a proposed demand sensitive or seasonal rate, the affected industry has the ability to "react positively". 49 C.F.R. § 1109.10 (e)(6).

Section 202(f) of the 4-R Act states expressly that the revisions to the Interstate Commerce Act did not modify pre-existing requirements contained in sections 2, 3 or 4.

C. Background Of the Commission's Orders.

In June of 1977, Southern Territory railroads adopted through their rate bureau, the Southern Freight Association, a rate proposal calling for a 20% seasonal increase in rates on whole grains and soybeans in railroad owned cars during the period September 15, 1977 through December 15, 1977, from, to and between points in Southern Territory, including certain points in Illinois and Indiana.[8] (A. 41-42) Advance special permission to publish the tariffs in a manner contrary to Commission tariff requirements was sought by the rail proponents from the Commission on August 1, and such permission was granted by Division Two on August 10.[9]

[8] The proposal also called for a like increase applicable on the same commodities from Southern Territory origins and certain origins in Illinois and Indiana to Florida, Gulf, South Atlantic and Virginia ports for export.

[9] Special Permission Application No. S-8472 (A.42); Special Permission Order No. 77-4800. No fourth section application was submitted by the carriers at any time.

The tariffs were published August 14, to be effective in 30 days, on September 15.[10] The precursors of this increase were two earlier proposals filed with the rate bureau in August and December of 1976 and later withdrawn.[11]

Thirty-five parties, including the States of Indiana, Illinois, North Carolina and Virginia, the U.S. Department of Agriculture, the Chicago Board of Trade, farmer cooperatives, millers, processors, and poultry and egg producers objected to the tariffs by submitting verified complaints, protests and petitions for suspension and investigation pursuant to section 15(8) of the Act. Protestants contended that the increase was purely a punitive revenue measure without any hope of inducing a "positive reaction" from affected shipping interests. Any conceivable shift in patterns of shipment was not practical or possible in view of the timing of the proposal, and, therefore, the proposal violated the intent of section 15(17) and the Commission's implementing regulations. Protesting parties also stressed that the tariffs as published were *prima facie* violative of sections 1(5), 2 and 3 of the Act.

In addition to protests for suspension [pursuant to Rule 40(g) of the Commission's rules, 49 C.F.R. § 1100.40 (g)], supported by affidavits demonstrating irreparable injury to be caused by the unlawful rates proposed, these respondents submitted a petition to reject [pursuant to Rule 99 of the Commission's General Rules, 49 C.F.R. § 1100.99] and supplementary petition to reject,

[10] Respondents obtained access to the tariffs by mail service on approximately August 18.

[11] Both these earlier proposals, later described by rail affiants before the Commission as "almost identical" to the 1977 proposal, met with unanimous opposition from the affected public and were withdrawn after public hearings before the rate bureau. (A. 42-43, 192) The June 1977 proposal was adopted by the rate bureau without public hearings. (A. 44).

demonstrating that the tariffs were permeated with violations of the long and short haul clause and, therefore, *per se* unlawful as published.[12] (A. 176-241, 242-247, 280-283).

The railroads replied in opposition to the supplementary petition to reject on the grounds that traffic had to move for there to be a violation of the fourth section, that the Commission had previously granted special relief for departures of the type in the tariffs and that "as any of these are called to our attention, steps will be taken to remove any possibility of a Fourth Section violation actually occurring." (A. 293)

The railroads also urged:

> "There is a great deal to be gained from the present carrier experiment in seasonal rates. The Commission itself noted in Ex Parte 324 that seasonal rate experimentation should be encouraged. In that Report, establishing the Commission's rules for seasonal rates, the Commission noted that § 4 difficulties appeared to have discouraged carrier innovation in the past. The Report states that it should be easier for the carrier to publish seasonal rates in the future. (Slip, pp. 39-40, January 28, 1977)." (A. 293-294)

Before acting, the Commission assigned this case to its formal docket[13] and transferred processing from the em-

[12] The petition to reject, filed September 6, alerted the Commission that the tariff schedules on their face violated section 4(1) and cited one rate example as representative. (A. 242-247) That particular example, prepared under the pressure of time in order to make the filing deadline before the Commission, was in error. On September 12, by a supplement to the petition for rejection, 5 additional origin and destination departures contained on the face of the tariffs were cited as illustrative of "hundreds which could be cited". (A. 283) Those examples, and numerous others presented subsequently on affidavit before the lower court, were correct and uncontroverted.

[13] The lead formal docket number 36663 was assigned by the Commission's Office of Proceedings.

ployee board[14] normally assigned routine rate proposal cases to the full Commission and to a division of three Commissioners.

At approximately 4:00 p.m. on September 14, the Commission issued two orders authorizing the tariffs to become effective as proposed. The first, an order by the entire Commission, summarized the allegations of objecting parties, the responses of the railroads, and concluded:

> "Weighing the contentions before us and the clear Congressional purpose to permit experimental ratemaking, we will permit this temporary adjustment to become effective."[15] (A. 289)

As to the fourth section issue, the order concluded:

> "The evidence offered to support the alleged violations of Section Four of the Act does not warrant suspension of this proposal. However, respondents are admonished to take prompt action to remove violations of the long-and-short haul provision of Section 4(1) of the Act, if any, in connection with inter-territorial and intra-territorial movements that may be caused by application of demand-sensitive rates on whole grains between points in southern territory." (A. 288)

The second order, issued by Division 2, denied the petitions to reject, and stated that "no valid reason exists for the rejection of the tariff publication matter". (A. 284)

D. Stay Proceedings Before The Eighth Circuit.

Respondents obtained ex parte[16] a stay of the Commission's orders authorizing the tariffs to become effective.

[14] The Suspension and Fourth Section Board.

[15] The Commission observed that the complaint sections of the Act ". . . protect, to a certain extent, the interests of those who may be adversely affected." (A. 289)

[16] Report of the Commission's action was relayed by phone to respondents late in the afternoon of September 14. The tariffs were scheduled to become effective at 12:01 a.m. that night.

In support of the stay, respondents submitted affidavits alleging irreparable harm from the impact of the proposed rate increases on their operations. Also submitted were two additional affidavits by respondents on the section 4(1) issue. The first cited as claimed fourth section violations the same five illustrative examples previously presented to the Commission in the supplementary petition to reject.[17] The second affidavit described twenty additional examples of illustrative fourth section violations over lines or routes of all rail carriers participating in the increase tariffs.[18]

In response, the railroads submitted affidavits alleging irreparable losses of revenue if the rates were stayed, and they argued that no specific harm had been demonstrated to be directly caused from fourth section departures. Even if such harm were alleged, they contended the Commission "has not authorized and will not condone such departures." [19]

Following hearing on the stay on September 22, the court issued an order concluding that the case appeared to be *sui generis* and that although a strong showing had been made of jurisdiction to order the Commission to stay the tariffs, it would dissolve the earlier stay on the basis of balancing the equities. The order admonished the railroads to observe the keep account provisions of section 15(8) "to enable prompt determination of over-

[17] Affidavit of John R. Staley, September 14, CC8, General Docket, Case No. 77-1729, file number 5.

[18] Affidavit of John R. Staley, September 21, attached to supplemental memorandum in support of issuance and continuance of interlocutory injunctive relief, CC8, General Docket, Case No. 77-1729, file number 28.

[19] Intervening railroads' reply in opposition to motion for stay pending review of an order of the Interstate Commerce Commission, September 21, page 6, CC8, General Docket, Case No. 77-1729, no file number.

charges should the contentions of petitioners prevail upon review." (A. 300)

On September 23, the Commission issued an order permitting the railroads to implement the rate proposal and ordering them, pursuant to section 15(8)(e) of the Act, to keep account of all amounts received under the increased rates and charges. (A. 301-302)

On September 27, to be effective October 27, the Southern Railway System published Supplement 30 to SFTB 972-F, ICC S-1359. On October 16, to be effective November 16, St. Louis-San Francisco Railway published Supplement 33 to SFTB 972-F, ICC S-1359. Both tariff publications were an attempt to remove certain of the fourth section departures in the tariffs which had become effective September 24.[20]

E. Decision On the Merits By The Eighth Circuit.

Although declining to reach the issue of reviewability of the no-suspend decision, the Court of Appeals held that the Commission's termination of or refusal to continue its investigation without resolving with detailed findings substantial charges of patent illegality under sections 2 and 4(1) was under the peculiar circumstances of the case reviewable and it vacated the Commission's orders and remanded the case with direction that the Commission investigate and make detailed findings and conclusions on the charges of patent illegality. If the investigation determined the tariff to be unlawful, the Commission was directed to make appropriate provision for refund of increased charges collected.

In support of its holding, the court found that the Commission orders were final as to the section 4(1) issue and that section 13 complaint procedures would not ade-

[20] No such tariff filings were made at any time by other rail carriers participating in the seasonal rate tariffs.

quately protect aggrieved parties.[21] (A. 309-310, 313, 314). On the Commission's disposition of charges of patent illegality of the tariff under section 4(1), the court found:

> "While no formal hearing on the lawfulness issue was ordered by the Commission, the protestants' basis for declaring the tariff violated applicable statutes was clearly raised before the Commission. The Commission's order refusing to pursue the investigation reflects that it recognized and considered the protestants' claims. We believe that the Commission was derelict in its responsibility in refusing to pursue the investigation of the substantial charges of illegality which were made. Its order in effect made the proposed tariff operative and placed it in effect. Its order reflects no supporting findings or a reasonable basis for so doing, at least with respect to the charged § 4(1) violations. Its order in effect is a final order on the § 4(1) issue." (A. 312-313)

The Court emphasized that although the precise issue before it had not previously been decided, analogous cases where similar Commission action had been found reviewable supported its conclusion that the Commission's orders were reviewable.[22] (A. 311-314) The Court also stressed that the allegations of patent illegality had been of sufficient substance to require in this case adequate investigation and detailed findings. (A. 315)

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[21] The court observed that section 13 proceedings would not resolve the issues of patent illegality raised by petitioners, would shift the burden of proof unfairly from the railroads to shippers, and would require consideration of "numerous" complaints by the Commission and the courts. (A. 312, 314).

[22] *City of Chicago* v. *United States*, 396 U.S. 162 (1969) (Commission termination of train discontinuance investigation held reviewable); *Aberdeen & R. R.R.* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 422 U.S. 289 (1975) (Commission conclusion in general revenue proceeding to give no further consideration to environmental factors held final and reviewable).

SUMMARY OF ARGUMENT

The long and short haul clause, or the fourth section, formerly section 4(1) of the Interstate Commerce Act, now 49 U.S.C. § 10726, is unique among statutory rate requirements and reflects clearly expressed Congressional intent that tariffs containing on their face higher charges for a shorter than a longer distance over the same route or line of railroad *not* be permitted unless (and until) the carriers proposing such tariffs apply for and obtain "special" case relief from the Commission. The Commission can grant such relief only after it has made a determination, accompanied by findings in a judicially reviewable order, that there is basis for the particular exception from the prohibition which is absolute and unqualified in its terms and intended effect.

Faced with protests and petitions for suspension, and petitions to reject proposed tariffs containing uncontroverted violations of the fourth section, the Commission chose to excuse the violations without compliance with section 4(1) requirements. It granted no relief, made no findings on the allegations of *per se* illegality, and authorized the tariffs to become effective and legally binding on the public. This was action in blatant defiance of the clearly stated requirements of section 4(1) that such tariffs not be permitted to take effect unless a special exception has been requested by the carriers (on application) and granted by the Commission.

As the agency entrusted with enforcement of the fourth section, the Commission had no discretion to ignore, leave unresolved, or leave to later section 13 proceedings substantial allegations that proposed rate increase tariffs were *per se* illegal under that section. Once such tariffs become effective, the Commission considers them legally binding and, absent immediate judicial review, the only relief for aggrieved parties is to submit individual section 13 damage complaints which cannot

reach the patent illegality of all the rates when the tariffs are authorized to become effective for the territory involved.[23] Section 13 procedures are intended to provide a remedy for carrier misconduct. They provide no remedy for agency misconduct which is at issue in this proceeding.[24] The Commission limits such proceedings to requiring individual shippers to prove specific damages on particular shipments caused by unlawfulness under sections of the Act other than section 4. There are a host of other practical reasons why separate complaint proceedings should not be required where the ICC has defied the fourth section, including shifting of the burden of proof, imposing illegal charges causing irreparable harm to affected interests (shippers and others), and results described *infra* at pages 39-42, Congress intended to avoid. Delayed review pending outcome of section 13 cases would also destroy the ratemaking scheme envisioned under the fourth section.[25]

The sweeping and unqualified nature of the fourth section as an absolute prohibition of rate tariffs containing forbidden discriminatory rate relationships has led a number of courts, including this Court, to consider orders of the Commission granting special relief to be immediately reviewable. *A. L. Mechling Barge Lines* v. *United States*, 368 U.S. 324, 330 (1961); *A. L. Mechling Barge Lines* v. *United States*, 376 U.S. 375, 381-386 (1964);

[23] This was recognized by the lower Court when, in vacating its initial stay order, it admonished the carriers to keep account of increased charges collected to enable prompt determination of overcharges if petitioners below prevailed.

[24] Required use of section 13 would be a futile exercise of litigating an error of law before the agency which committed the error.

[25] The United States' position reflects a basic misconception of the fourth section since by specifically condemning, absent prior justification, tariffs with fourth section departures, Congress intended that the public be spared the uncertainties, delays, costs, and other considerable drawbacks to use of section 13 procedures.

Seaboard Allied Milling Corp. v. *United States*, 306 F. Supp. 879, 883 (W.D.Mo. 1969) (three judge court); *Seatrain Lines, Inc.* v. *United States*, 168 F.Supp. 819, 825 (S.D.N.Y. 1958). Such authority is persuasive here since the Commission's action was tantamount to excusing patent violations of the fourth section without findings and without observing statutorily prescribed procedures. Further, under the doctrine of immediate reviewability of agency action contrary to or in excess of statutory powers of *Leedom* v. *Kyne*, 358 U.S. 184, 190 (1958), immediate review here was indisputably appropriate. Without such review, the Commission would be free continually to frustrate the objective of section 4(1) with adverse consequences for the public which Congress intended to avoid by enactment and subsequent strengthening of this section.

Petitioners have repeatedly argued that this is a case of court interference with discretionary exercise by the Commission of section 15(8) powers. They suggest that the decision below leaves every ICC determination not to investigate open to judicial review. The decision is much narrower in scope and holds that under the unique circumstances of this case, where substantial charges of patent illegality under section 4(1) were raised prior to rate effectiveness, the Commission could not lawfully authorize the rates without resolving such charges by adequate investigation and detailed findings. The court did not interfere with application of Commission discretion but required the Commission to comply, as it should have initially, with the statute.[26]

Affirmance will not involve adverse consequences for the Commission or the railroads, but will require in the future that the carriers not seek to publish tariffs with-

[26] Verification of the allegations of patent illegality would have been an easy task for the Commission.

out either clearing unauthorized departures from the tariffs or seeking advance approval from the Commission for special case authorization as required by the statute. If, which is unlikely, the Commisison were to repeat its effort to sidestep the fourth section, immediate judicial review should be available to correct that statutory abuse.

In effect, this case is *sui generis* and affirmance will not represent a departure from prior precedent but will be consistent with this Court's most recent pronouncement on Commission misuse of rate review powers in *Trans Alaska Pipeline Rate Cases*, 463 U.S. 631, 638-39, n. 17 (1978).

ARGUMENT

I

THE COMMISSION'S ACTION REVIEWED BY THE EIGHTH CIRCUIT WAS IN EXCESS OF AND CONTRARY TO ITS STATUTORY AUTHORITY UNDER THE FOURTH SECTION.

A. The Legislative History Of The Fourth Section Discloses Congressional Intent That The Fourth Section Is To Be An Absolute And Unqualified Prohibition.

Unlike other sections of the Act, section 4(1) is sweeping, unqualified, and absolute in the duty it imposes on the carriers not to publish and the Commission not to allow to become effective tariffs with fourth section departures without special authorization after compliance with fourth section procedures and requirements.

The long and short haul provision appeared in the original Interstate Commerce Act of February 4, 1887.[27] Its original provisions were similar to those in the present

[27] Ch. 104, pt. I, § 4, 24 Stat. 380 (1887).

day statute, except that the prohibition was qualified by the phrase "under substantially similar circumstances and conditions."[28]

The purpose of the statutory provision was to single out for specific prohibition rate tariffs proposing higher charges for shorter distance hauls than for longer distance hauls over the same line or route of railroad. However, because of the insertion of the troublesome similarity clause, the prohibition soon became emasculated by interpretation allowing the railroads initially and unilaterally to decide whether circumstances were similar so as to require authorization from the Commission.[29]

As a result, Congress amended Section 4 to assure that the carriers could not circumvent the prohibition by unilateral decision as to similarity of circumstances and conditions. The Mann-Elkins Act of June 18, 1910[30] wholly eliminated the phrase "under substantially similar circumstances and conditions". The purpose of the amend-

[28] The original provision stated in pertinent part:

> "SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, *under substantially similar circumstances and conditions*, for a shorter than for a longer distance, the shorter being included within the longer distance. . ."

As in today's version, the 1887 provision allowed the Commission to grant special relief upon application by the carrier and after investigation.

[29] The clause was construed to allow the carriers to decide for themselves, subject to later court challenge, whether the circumstances were similar or dissimilar at the lower and higher rated points. *Re Southern Ry. & S.S. Ass'n*, 1 I.C.C. 278 (1887); *Interstate Commerce Commission* v. *Alabama Midland Ry.*, 168 U.S. 144 (1897). The effect was to negate the intent of the prohibition to require advance authorization to be sought and obtained from the Commission.

[30] Ch. 309, § 8, 36 Stat. 547 (1910).

ment was explained by its sponsor, Congressman Mann, during debate:

> "Of course under existing law, as construed by the courts, the long and short haul clause amounts to nothing. Under the proposition which we have presented, if enacted into law, there must be application made in special cases to the Commission which grants authority to charge a less amount for the longer distance than for the shorter distance and we think the power can safely be lodged in the hands of the Commission." [31]

The significance of this amendment as imposing an unqualified prohibition was stressed by this Court in 1914 in *Intermountain Rate Cases*, 234 U.S. 476, at 484:

> "It is certain that the fundamental change which it [the 1910 amendment] makes is *the omission of the substantially-similar-circumstances-and-conditions clause, thereby leaving the long and short haul clause in a sense unqualified except insofar as the section gives the right to the carrier to apply to the Commission for authority to charge less for longer than for shorter distances for the transportation of persons or property and gives the Commission authority from time to time 'to prescribe the extent to which such designated common carrier may be relieved from the operation of this section.'* "

The carriers would have a right to "seek and obtain under authorized circumstances" the Commission's sanction to depart from the prohibition, and whether such authority could be obtained would depend upon the facts and exercise of the Commission's sound discretion ". . . with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the 2d and 3d sections." 234 U.S. at 486.[32]

[31] April 12, 1910, Congressional Record at 4582.

Congress again strengthened the prohibitory language of section 4 in the Transportation Act of 1920.[33] Added limitations were imposed on the Commission's authority to grant exceptions. Rates for the more distant points were required to be reasonably compensatory for the service performed, and relief due to water competition was limited to actual, not merely potential, competition. A provision was also included regarding intermediate rates on circuitous lines.[34]

The Transportation Act of 1940 [35] is particularly instructive as to Congress's intent that the Commission handle tariffs containing fourth section departures differently than other rate filings and that advance authorization be issued for the carrier to establish tariffs containing violations of the strict terms of the prohibition. The original Senate bill (S. 2009) proposed that application for relief be dealt with by the Commission in accordance with the discretionary investigation and suspension procedures in Section 15(7).[36]

[32] The Commission itself has recognized that the 1910 amendment requires advance approval to be obtained by the carrier:

> "It is clear that whereas prior to 1910 the carriers acted in the first instance to establish long and short haul discriminatory rates and the Commission merely reviewed them, subsequent to the passage of the amendment the carriers had first to apply to us for approval." *Rates and Charges Over Circuitous Routes In The U.S.*, 294 I.C.C. 714, 718 (1955).

[33] Ch. 91, § 406, 41 Stat. 480 (1920).

[34] This last provision was eliminated in the Transportation Act of 1940.

[35] Ch. 722, § 6, 54 Stat. 904 (1940).

[36] S. 2009 stated: "And provided further, that tariffs proposing rates subject to the provisions of this paragraph may be filed when application is made to the Commission under the provisions hereof, and such application and tariffs shall be handled in accordance with the provisions of paragraph (1) of section 28 of this Act." [Section 28 of the bill dealt with Section 15(7) of the Interstate Commerce Act].

Commission Chairman Eastman responded to this proposal in a report to the Congressional Conference Committee on S. 2009: [37]

> "Some fear has been expressed that under the wording of the bill, the Commission might have discretion to permit the tariffs to become effective without suspension and investigation, as in the case of tariffs filed under Section 28 of the Senate Bill [§ 15(7)]. The proposed revision is intended to avoid this fear and at the same time accomplish the real intent." (parenthetical added)

The revision suggested by the Commission to S. 2009 was as follows:

> ". . . and if the Commission shall not have acted upon said application [for § 4(1) relief] at the end of seven months after the date of filing, such tariffs shall thereupon unless voluntarily postponed, become effective pending such action." (parenthetical added)

Congress, however, ultimately adopted neither the original language in S. 2009, nor the Commission's revised proposal. The provision in the Transportation Act of 1940 provided: [38]

> ". . . tariffs proposing rates subject to the provisions of this paragraph may be filed where application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice."

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[37] January 29, 1940 letter from the Chairman of the Legislative Committee, Interstate Commerce Commission, Seventy-Sixth Congress, Third Session, Transmitting to the Chairman of the Senate Interstate Commerce Committee and the Chairman of the Committee on Interstate and Foreign Commerce of the House of Representatives a Report Relative to Omnibus Transportation Legislation, S. 2009, as Passed by Both Houses of Congress, page 70.

[38] Section 6(a)(a) of the Pub. L. 785.

As recodified without substantive change this provision now reads:

> "The Commission shall begin a proceeding under subsection (b) of this section on application of a carrier. A carrier may file a proposed rate with its application, and if the application is approved, the Commission shall allow the rate to become effective one day after the approval becomes effective." 49 U.S.C. § 10726(d).

Thus the legislative history of section 4 indicates Congress intended that tariffs containing departures from the strict prohibition not become legally effective without prior approval by the Commission on application by the carrier for relief. No discretion is afforded either the carriers or the Commission to evade the stated statutory requirements.[39]

Although the subject of relieving the strict application of the fourth section has been discussed or raised at various times during the history of the Act, Congress has not adopted such changes and, accordingly, has reaffirmed its intent that the long and short haul clause remain unqualified and absolute.[40] The most recent legislative con-

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[39] In 1957, Congress added a provision allowing carriers without advance authorization from the Commission to charge higher rates for shorter than longer distance hauls over circuitous routes where the rates are published to meet charges of a competitor operating over a more direct route. 71 Stat. 292 (1957), 49 U.S.C. § 4 (1958). This was done because applications for such relief were almost always granted, and represents the only statutory exception to the absolute prohibition against fourth section departures. (The railroads in this case did not contend at any time before the Commission or the lower court that they were excused by virtue of the circuity clause.)

[40] During 1957 consideration on the circuity exception, Secretary of Commerce Weeks suggested that the clause be restructured to allow tariffs with departures to become effective under certain conditions without ICC approval. No such amendment was adopted. In 1972, the Commission recommended to Congress that section 4 be

sideration of rail ratemaking regulatory provisions occurred in the 4-R Act of 1976. Congress expressly provided in section 202(f) of that Act:

> "nothing in the amendments made by this section (202) shall be construed to modify the application of sections 2, 3 or 4 of the Interstate Commerce Act in determining the lawfulness of any rate or practice." [41]

B. Prior Court Decisions Support The Legislative History That The Fourth Section Is Absolute In Prohibiting Tariffs Containing Fourth Section Departures Absent Compliance With Statutory Prerequisites.

The sweeping, unqualified nature of the fourth section prohibition against tariffs containing unauthorized departures has been underscored in a number of decisions by this Court and other courts.[42] In this Court's consideration of the fourth section in *A. L. Mechling Barge Lines* v. *United States*, 376 U.S. 375, 385 (1964), the prohibition was characterized as a "particularized" anti-discrimination provision which should be administered in harmony with sections 2 and 3 of the Act, and requiring in most cases a single proceeding to resolve all issues

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amended "to give the ICC discretion to allow long and short haul departures when investigation is unnecessary." ICC Annual Report to Congress 1972, pp. 90-91; S.2630 (92nd Cong. 1st Sess.) (1972). Its recommendation was not adopted.

[41] Section 202(f) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 36.

[42] *Intermountain Rate Cases*, 234 U.S. at 484; *United States* v. *Louisville & N. R.R.*, 235 U.S. 314, 322 (1914); *United States* v. *Merchants & Manufacturers Traffic Ass'n of Sacramento*, 242 U.S. 178, 187 (1916); *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 567 (1919); *A. L. Mechling Barge Lines* v. *United States*, 376 U.S. 375, 384-385 (1964); *Wirthmore Feeds, Inc.* v. *Baltimore & O. R.R.*, 221 F.Supp. 745, 747-748 (W.D.N.Y. 1961).

of lawfulness before fourth section relief could be granted.[43]

C. Although The Commission Can Grant Fourth Section Relief Authorizing Exceptions From The Absolute Prohibition, It Must Do So Upon Proper Application After Investigation And Its Findings Are Immediately Subject Of Judicial Review.

Special relief can be granted under section 4(1) only upon submission of application, investigation by the Commission of the circumstances, and issuance of an order granting relief with adequate findings. The statute imposes a heavy burden on the carrier to prove "special" case circumstances exist warranting such relief. *A. L. Mechling Barge Lines* v. *United States*, 376 U.S. at 385; *Waterways Freight Bureau* v. *United States*, 561 F.2d 947, 950 (D.C. Cir. 1977).

Among circumstances considered by the Commission with respect to special case authorization are the similarity of competitive circumstances involved at the shorter and more distant points on the direct routes involved, carrier competition (if water competition, it must be actual rather than potential), and market competition. Detailed tests are applied to determine whether the charges from and to the more distant points are "reasonably compensatory" for service performed, and competition, even if alleged, does not *ipso facto* entitle an applicant to relief.[44] In addition, relief will not be granted to establish rates that may be in violation of

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[43] Although not faced with disregard by the Commission of section 4 as blatant as in this case, the Court observed:

> "The Congress might well have concluded that such a practice (violation of the long and short haul clause) was so pernicious that it required specific condemnation." 375 U.S. at 385.

[44] See, for example, *Transcontinental Cases of 1922*, 74 I.C.C. 48, 71 (1922); *Iron Or Steel Slabs From Cincinnati, Ohio, and Newport, Ky., To Riverdale, Ill.*, 308 I.C.C. 151, 154 (1959).

other sections of the Act, in particular sections 2 and 3 dealing with discrimination, preference and prejudice.[45]

Thus, while the statute is strict in requiring findings of special case on application by the carrier, the Commission applies transportation judgmental considerations to the particular circumstances surrounding the proposed rates and it may grant relief for competition, or other reasons, once a "special" case has been demonstrated by the carrier applicant.[46] In every instance, the existence of a special case is to be determined on the facts of the particular situation before the Commission. *Class Rates At Points East Of Rocky Mountains*, 308 I.C.C. 293, 297 (1959).

D. The Actions Of The Carriers And The Commission In This Case Were In Clear Violation Of Section 4(1).

Although they published in August of 1977 a tariff proposal, approved by their rate bureau in June, and according to them, "almost identical" to two earlier proposals considered in August and December of 1976, the participating rail carriers took no steps to remove prior to publication fourth section departures contained in their tariff. Nor did they submit an application as required by the statute and Commission regulations thereunder to obtain special relief for unauthorized departures. They had ample opportunity as early as 1976 (August and December proposals which were "almost identical" to the 1977 proposal), to comply with the statute. Their intent is irrelevant as the fourth section

[45] *Nepheline Syenite From Ontario, Canada to the East*, 308 I.C.C. 561, 565 (1959); *Fine Coal To Eau Claire And Chippewa Falls, Wis.*, 308 I.C.C. 583, 588 (1959); *Grain, To, From And Within Southern Territory*, 340 I.C.C. 846, 854-855 (1972) (relief found justified but denied because rate proposal would result in violations of other sections of the Act.)

[46] The only exception not requiring advance authorization is the circuity provision, 49 U.S.C. § 10726(a)(2), not involved in this case.

prohibits departures absolutely whether inadvertent or otherwise and contemplates advance special case authority for tariffs which contain departures.[47]

When confronted with demonstrated fourth section violations, the carriers asked the Commission to excuse them from section 4(1) compliance on the representation that theirs was an "experimental" rate program and that the Commission itself in Ex Parte 324 had noted that fourth section "difficulties" had appeared to have discouraged carrier innovation in the past.[48] They pleaded for leniency reminding the Commission of its promise in Ex Parte 324:

> "that it should be easier for the carriers to publish seasonal rates in the future." (A. 294)

Neither order issued came to grips with or resolved the fourth section issue. Division Two's order denied the petitions to reject by administrative fiat.[49] No explana-

[47] The railroads also knew prior to the proposed effective date that their proposal violated section 4(1). More importantly, the *Commission* also *knew* of the patent illegality yet it abdicated its statutory responsibility by authorizing the tariffs.

[48] The railroads did not deny that the tariffs contained rates charging more for a shorter than a longer distance over the same routes but argued (1) that a departure is not a violation without movement of traffic, and (2) that the Commission had previously granted relief on a "continuing" basis in a prior fourth section proceeding. (A. 292-294) No movement of traffic is necessary for there to be a violation since to conclude otherwise would not accord "proper weight to imperative requirements concerning publication of rates and subsequent observance of them." *Davis* v. *Portland Seed Co.*, 264 U.S. 403, 424 (1924); *New Process Gear Corp.* v. *New York Central R.R.*, 281 I.C.C. 701, 703 (1951). The case relied upon by the carriers for so-called "continuing" relief had in fact held specific relief would be required on application where rates are opposed or protested. *Commodity Rates East of the Rocky Mountains*, 329 I.C.C. 212, 215-216 (1966).

[49] ". . . no valid reason exists for the rejection of the tariff publication matter . . ." (A. 284) No findings were made as to allegations of patent illegality under section 4(1).

tion was offered that the allegations were not true or valid.[50]

Simultaneously, the entire Commission released its order on all issues concerning the proposed tariffs, including fourth section patent illegality. That order also made no findings on respondents' charges other than the conclusory assertion that the "evidence offered" did not warrant suspension. (A. 288) The only responsive comment on the patent illegality issue was a general admonishment that violations "if any" be removed. The "if any" phrase indicates the Commission was indifferent to its statutory obligation to observe section 4(1) requirements since it did not determine, as it easily could have, that respondents' allegations were in fact correct. Departures either do or do not exist on the face of tariffs and the Commission is equipped with expert technical personnel who can readily verify departures in tariff rate schedules. Another possibility is that the Commission misconceived the nature of the prohibition of the fourth section as allowing it to enforce the clause by post-effectiveness administration without strictly observing the requirements of the statute. In either case, indifference or misunderstanding, the Commission exceeded its statutory powers by authorizing the tariff contrary to the fourth section.

After its two orders authorizing rate effectiveness, the Commission took no further action pursuant to section 4(1).

Subsequent attempts by two carriers participating in the tariff to remove departures were a direct admission that the tariff had been published and become effective in violation of section 4(1). These carriers attempted to correct violations which they had previously argued to the Commission did not exist.[51]

[50] The order sidesteps that basic issue totally.

[51] None of the other participating railroads (the Baltimore & Ohio, the Norfolk & Western, the Seaboard Coast Line, the Louisville & Nashville, the Burlington Northern and the Illinois Central Gulf) even tendered tariff amendments of this nature. The net effect was that the tariffs were permeated with violations of the fourth section for nearly all of the approximately three month period the tariffs were in effect. Despite its direction to the carriers in the order authorizing the tariffs to become effective and despite representations of its counsel at oral argument before the lower court, the Commission took no further steps to investigate the issue or seek compliance after its September 14 orders.

Before the stay order was vacated, respondents had submitted to the Court twenty additional examples of violations of section 4(1) contained in the tariff the Commission had approved. As before the ICC, respondents emphasized that these were merely illustrative of hundreds of other examples of violations of section 4(1).[52] At no time have the carriers denied the existence of these departures.[53] They simply charged and received rates under tariffs illegal *per se* from the day they were authorized contrary to section 4(1) requirements.

In its brief the Commission *post hac* rationalizes the orders at issue by speculating that the failure to take action may have been because of "doubts that the rates would in fact violate Section 4." (Commission's brief, p. 61) This demonstrates the Commission's indifference to and/or misconception of its fourth section responsibilities. It was the Commission's statutory duty to verify the allegations of patent illegality and it could have easily done so. Alternatively, the Commission also now speculates on brief:

> ". . . the Commission may have believed that any violations [of Section 4(1)] would be limited to isolated instances, that they would not in any event

[52] The supplemental examples, in addition to those previously submitted, showed violations over the lines and routes of all the participating rail carriers.

[53] Their argument that departures were not violations receded after the Commission's order was served admonishing them to remove violations. As noted earlier, only two carriers even purported to make such filings.

cause significant injury to large segments of the shipping or consuming public, and that the Section 13(1) complaint procedure would afford an adequate remedy for any person actually injured and a more suitable mechanism for resolving isolated Section 4 issues." (Commission's brief, pages 61-62).

If the foregoing observation correctly reflects the Commission's rationale (notably unexplicated in the orders), the Commission knew, as we suspect, that respondents' allegations were true but decided to ignore the violations on the unfounded assumption (contradicted by respondents' unrefuted allegations[54]) that the violations were "isolated" or that they would result in no significant injury. Section 4(1) does not speak of "isolated" violations, nor does it speak of balancing or weighing injuries. It flatly prohibits tariffs containing long haul short haul departures unless the Commission, after investigation and findings, approves the tariffs under the "special case" exception. In any event, after-thoughts on brief cannot excuse the Commission's earlier unlawful action.[55]

The Commission has made no secret of its strong dislike for the requirements imposed on it by the fourth section.[56] The railroads relied on that antipathy successfully in their reply to petitions to reject when they reminded the Commission that it had in Ex Parte 324 noted

[54] Respondents' supplementary petition to reject cited 5 illustrative fourth section origin and destination departures "*representative of hundreds which could be cited.*" (A. 283) Before the lower court, respondents cited twenty other representative departures at different points.

[55] Whatever discretion the Commission could exercise in investigating and determining special case authorization under section 4(1) was not an issue. As noted by the lower court, no fourth section application was ever submitted or processed. (A. 309)

[56] As noted *supra* at note 40, pages 21-22, the Commission unsuccessfully recommended to Congress that section 4(1) be relaxed to afford it discretion to authorize departures without investigation.

"difficulties" in the past with section 4(1) and had promised that it "should be" easier in the future for carriers to publish seasonal rates.[57] (A. 294) Apparently, the Commission decided to bend the statute to accommodate the carriers without concern for the public, shippers, farmers, processors, and other adversely affected agricultural interests.

Faced with rate tariffs which it knew or should have known contained numerous unauthorized departures, the Commission could not lawfully authorize effectiveness. It should have rejected or suspended the tariffs. At a minimum, the Commission should not have authorized the tariffs to become effective without resolving the charges of patent illegality by adequate investigation and keep account protection for the shipping public. The effect of the lower court's decision is to require the Commission to heed its section 4(1) obligations by completing and/or conducting such an investigation with such action accompanied by refund protection for those who paid the rates if found unlawful as alleged.

1. *The Effect of Commission And Carrier Treatment Of Section 4(1) Distorts The Statutory Scheme Intended By Congress.*

Petitioner railroads have previously conceded that application "must be" filed with the Commission before departures will be allowed from the "strict and clearly stated restrictions of section 4(1)." [58] Neither they nor the Commission deny that aggrieved parties have a statutory entitlement to challenge such applications for relief when filed.[59] However, objecting parties have such a remedy

[57] This was a direct "hint" to the Commission which it quickly understood and to which it responded by allowing the rates contrary to section 4(1) requirements.

[58] Brief of railroad intervenors, before the lower court, page 25.

[59] Commission rules provide that applications for special relief must contain detailed information as to the basis of the request, any

only when the carriers properly submit application pursuant to section 4(1). Since such submissions are within their control, the carriers can easily defeat the right of affected parties to object by failing, as they did here, to submit an application. The effect is to cut off the procedural opportunity to challenge tariffs containing departures prior to effectiveness and to relieve carriers of the burden of establishing special relief prior to imposing tariffs with departures.

2. *Although The Commission Has Previously Been Reversed For Abusing Its Authority Under Section 4(1), This Is the First Case Where It Blatantly Attempted To Ignore The Plain Requirements Of That Section.*

Although this appears to be the first case of almost total defiance of the fourth section by the Commission, there have been a number of court decisions which have reversed or criticized the Commission's misapplication of this section of the Act. The most frequent ground for reversal has been for failure by the Commission to explicate its basis for action through rational, detailed findings. Such cases involved orders following application by the carriers but the orders were, as here, seriously lacking in adequate findings.[60]

In 1961 and again in 1964 this Court dealt with Commission action in derogation of its duty to administer the fourth section. In *A. L. Mechling Barge Lines* v. *United States*, 368 U.S. 324 (1961), the Commission conceded its challenged practice of issuing "temporary" fourth section orders was improper and it agreed to make findings in the future in support of its orders granting protested fourth section applications.[61] In 1964, the Commission's practice of restricting hearings on applications for fourth section relief strictly to fourth section issues, without considering and finally resolving contested issues of lawfulness under other sections of the Act, was found incompatible with proper enforcement of the Act.[62] *A. L. Mechling Barge Lines* v. *United States*, 376 U.S. 375 (1964).

In this case, the Commission did not even purport to observe the fourth section's required procedures.

party may protest the application, and petitions for reconsideration may be filed within 20 days after initial action by the employee board which processes such applications, the Suspension and Fourth Section Board. 49 C.F.R. §§ 1100.38, 1100.200, 1300.77-.85.

[60] *Seatrain Lines* v. *United States*, 168 F.Supp. 819, 826-827 (S.D.N.Y. 1958); *A. L. Mechling Barge Lines* v. *United States*, 368 U.S. 324, 331 (1961); *Seaboard Allied Milling Corp.* v. *United States*, 306 F.Supp. 879, 883-884 (W.D.Mo. 1969).

II

THE ARROW DOCTRINE DOES NOT FORBID JUDICIAL INTERVENTION TO CORRECT AGENCY ACTION CONTRARY TO OR IN EXCESS OF STATUTORY POWERS.

Petitioners characterize the Commission's action as purely a section 15(8) negative determination, nonreviewable at any point in time. The United States parts from the Commission in suggesting that a negative determination not to investigate is eventually reviewable but only after completion of section 13 complaint proceedings before the Commission. Petitioners and the United States are both incorrect. Discretion was not involved, nor was mere "burden allocation".[63] Agency action

[61] This Court indicated the Commission's agreement to make findings in all future protected fourth section cases may lead the Commission to provide for hearing "at least in some circumstances". 368 U.S. at 331.

[62] This Court held that where rates requiring fourth section relief are challenged, all issues are to be consolidated in one case unless not raised or brought to an adversary position, or consolidation "would inordinately delay the § 4 proceeding". 375 U.S. at 386.

[63] The United States' position that section 15(8) decisions are "burden-allocation determinations" ignores the fact that the Com-

contrary to its statute and causing substantial irreparable injury to the public was at issue.

A principal rationale in the *Arrow* case was that judicial intrusion in discretionary non-final determinations by the Commission under section 15(7) [now 15(8)] would invade the Commission's ratemaking province prematurely, particularly with respect to the agency's "independent appraisal of the reasonableness of rates".[64] Congress vested the Commission with exclusive power to prevent the collection of rates alleged to be unjust or unreasonable and this was considered to have stripped courts of common law injunctive power at the section 15(7) stage of a rate proceeding.[65]

Critical to the Court's holding, however, was the fact that survival of such judicial power to enjoin rates would be at odds with exercise of the Commission's power to exercise its discretion in evaluating by final order the lawfulness of proposed rate changes. Nothing in the opinsion suggests that Congress intended to deny courts the power to intervene to prevent or correct Commission action in excess of clearly expressed statutory authority.

The deleterious results envisioned in *Arrow*, and other similar cases,[66] of judicial intrusion in preliminary Commission rate proceedings, do not exist, in our view, where the action of the Commission is clearly in defiance of its statute in a situation where it has no discretion. At issue in this case was not the reasonableness of a rate

mission orders in this case authorized for effectiveness rates illegal on their face, leaving adversely affected parties no effective remedy but immediate court review.

[64] *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 670-672 (1964); See also *United States* v. *SCRAP*, 412 U.S. 669 (1973).

[65] The holding expressly did not extend to judicial power to preserve court jurisdiction or maintain the status quo pending review of final agency action. 372 U.S. at 671, note 22.

[66] *United States* v. *SCRAP*, 412 U.S. at 696-698; *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 819-826 (1973).

proposal but whether the proposal as filed by the carriers and as authorized to become effective was *per se* illegal in violation of section 4(1). The court below faced total failure by the Commission to observe fourth section requirements and procedures. Its unlawful action authorizing the challenged tariffs was compounded if not induced by the carriers' efforts to seek prompt establishment of the illegal tariffs without applying for or requesting in any form a determination of "special" case authorization as required by the fourth section.

The lower court, under the circumstances, could have, and we believe should have, enjoined the rates. Its lesser course, to require completion of the Commission investigation of *per se* illegality, was certainly appropriate and in no way in derogation of the guiding principles of *Arrow*.[67]

The lower court exercised jurisdiction in an attempt to insure that the Commission not "overstep the bounds" of its authority. Its action was thus consistent with this Court's latest pronouncement on the limitations of the *Arrow* doctrine.[68] The court was also not interfering with the timing of the rate proposal, nor was it second-guessing the Commission on any matter entrusted to agency discretion. The Court required that the Commission do what should have been done in the first place: conduct adequate investigation of allegations that the tariffs as filed were *per se* illegal as proposed and that the carriers were attempting to circumvent the fourth section. Judicial review was fully justified for the limited purposes for which invoked.

[67] Although it admonished keep account procedures by the carriers, the court did not profess to judge the merits of the section 4(1) charges except to note they were substantial. In fact the allegations were uncontroverted.

[68] *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 638-39 n. 17 (1978).

Although the action authorizing the tariffs to become effective occurred at an otherwise provisional stage of rate review, the Commission's action was final insofar as clothing the tariffs with legality and making them binding. To conclude the Commission's action is unreviewable under *Arrow* would effectively insulate from judicial correction plain contradictions of the statute.[69]

The Commission's orders here disposing of the fourth section issue should be immediately subject of judicial review for the added reason that they disposed finally of a general issue of illegality pertaining to the entire rate increase throughout the affected geographic territory in which the tariffs were proposed to be effective. The Commission's treatment of that general issue at the time of proposed rate effectiveness could not be effectively raised in subsequent individual section 13 cases.[70]

Whether a fourth section departure exists is readily determinable by the Commission by scrutiny of rate tariffs on their face. Findings on that issue can readily be made and reviewed in court for adequacy. In fact, we suspect that the Commission would not risk court confrontation by baldly permitting rate tariffs with unauthorized departures to become effective again.

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[69] In the future the Commission could easily state "we find no basis for suspension" or "the evidence offered does not support alleged violations" or "the carriers are admonished to remove violations, if any, in connection with the proposed rates", convenient semantics for evasion of section 4(1).

[70] The Commission and the United States have previously conceded that conclusions in general revenue orders on general issues such as need for revenue are immediately reviewable. *SCRAP II*, 422 U.S. at 317, n. 18; see also *Council Of Forest Industries* v. *Interstate Commerce Commission*, No. 76-1926, slip op. at 11, (D.C. Cir. 1978).

III

NEITHER STATUTORY EXCEPTION TO JUDICIAL REVIEW IS APPLICABLE IN THIS CASE.

Section 702 of the Administrative Procedure Act (APA) expressly provides for judicial review by *any* person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." 5 U.S.C. § 702. This mandate is limited only by the exceptions found in Section 701(a) which preclude judicial review only to the extent that "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." Neither exception is applicable.

A. Judicial Review Is Not Precluded By Statute.

Preclusion of judicial review by statute may be either express or inferred from an examination of the entire legislative scheme. *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977). However, as this Court held in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1966), ". . . judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress" and ". . . that only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." See also *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975).

The legislative history of the fourth section supports reviewability where the carriers and the Commission seek to evade the clear requirements of the statute. In a number of earlier court decisions, fourth section orders have been considered final and reviewed for lack of adequate findings. Here the Commission did not even purport to grant relief, ignored the violations, and authorized the tariffs to become effective and binding.

What concerned the lower Court in this case was the Commission's failure or refusal to heed the fourth section, not mere failure to exercise section 15(8) power. This is a far narrower ground for review then that which appears to concern the Commission. Compliance by the Commission with the steps required by the statute would not jeopardize the ratemaking process.[71]

The Commission has failed to present any evidence, express or inferential, that Congress sought to insulate from judicial review action which ignores the dictates of section 4(1).

B. The Commission's Action Was Not Committed Solely To Agency Discretion.

Petitioners' briefs to this Court have focused on the discretionary aspects of section 15(8) regarding investigation and suspension of proposed rates while ignoring the non-discretionary obligations imposed by section 4 (1).

The long and short haul clause is anything but a statute drawn in such broad terms that there is no law to apply. The plain meaning is clear. Just as in *Citizens To Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), the statutory standards guiding the Commission's action provide "law to apply".[72]

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[71] Whatever delay or complication might be caused the Commission in processing proposed tariff changes was presumably considered by Congress when it enacted fourth section requirements, strengthened these by subsequent amendment, and as recently as 1976, left the prohibition unqualified although it modified ratemaking provisions in a number of other respects.

[72] The standards of section 4(1) are no less precise and capable of application by a reviewing court in the context of Commission action in defiance of such requirements as were the standards applied in *Overton*, 401 U.S. at 411.

C. Prior Court Decisions Establish The Immediate Reviewability Of Agency Action In Excess Of Statutory Powers.

Where an administrative agency acts or fails to act in flagrant contravention of its statutory authority, the agency's action is immediately reviewable.[73] Exhaustion is not required since the reviewing court need only construe the statute in question and determine whether the agency flagrantly disregarded the statute. The traditional reasons for exhaustion as set forth in *Parisi* v. *Davidson*, 405 U.S. 34, 37 (1972) do not exist.

To review the Commission's action in this case did not propel the lower court into the Commission's exclusive domain of rate evaluation and regulation. The statute was clear in requiring prior approval ("special" case) for tariffs charging more for a shorter than longer distance. Respondents demonstrated by uncontroverted examples before both the Commission and the lower Court that the tariff in issue contained such forbidden rate relationships.

The carriers had submitted no application for relief, the Commission's orders made no findings on the patent illegality of the tariffs, and it granted no relief pursuant to section 4(1). In such circumstances, a court has a duty to intervene to correct statutory abuse and in taking such action, the lower Court was not interfering with ICC application of ratemaking standards. Rather it

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[73] *Leedom* v. *Kyne*, 358 U.S. 184 (1958); *Seven-Up Co.* v. *FTC*, 478 F.2d 755 (8th Cir. 1973), *cert. denied*, 414 U.S. 1013 (1973); *Boire* v. *Miami Herald Publishing Co.*, 343 F.2d 17 (5th Cir. 1965), *cert. denied*, 382 U.S. 824 (1965); *United States* v. *Feaster*, 410 F.2d 1354 (5th Cir. 1969), *cert. denied*, 396 U.S. 962 (1969). This doctrine applies with equal force where an agency fails to exercise its statutory responsibility. *Templeton* v. *Dixie Color Printing Co.*, 444 F.2d 1064, 1068-1069 (5th Cir. 1971); *Terminal Freight Handling Co.* v. *Solien*, 444 F.2d 699, 703-704 (8th Cir. 1971).

was ordering that the Commission observe the basic scheme intended by Congress.[74]

D. Considerations Of Finality Support Immediate Reviewability Of The Commission's Orders.

As found by the lower court, the Commission's orders were final as to the section 4(1) issue. (A. 313) Nothing more remained to make the proposed tariffs legally effective and binding. The Commission disposed of respondents' petition to reject and requests for suspension and investigation on a final basis with respect to the scheduled and proposed date for rate effectiveness.[75] Its action was thus reviewable pursuant to the Administrative Procedure Act, 5 U.S.C. § 704. If orders granting fourth section relief pursuant to application are reviewable when issued without delay,[76] then orders of the type issued here by the Commission denying petitions to reject and refusing to observe plainly stated statutory requirements should be considered equally reviewable for adequacy of findings and statutory compliance. Indeed

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[74] The court also was careful to point out that it was not resolving the merits of patent illegality issues but only noted that they were substantial and sufficient to require adequate investigation by the Commission. (A. 312-313, 315) From its opinion, it is apparent that the overall concern of the court was the ICC's violation of its statutory obligations under section 4(1) and its unwarranted abdication of authority.

[75] One petitioner, Seaboard Coast Line, asserts (for the first time) respondents could have or should have appealed the failure to reject before the ICC. (Brief of Seaboard Coast Line, pages 18-19) Such an appeal would have been undisputably futile since the Commission issued its order late in the afternoon of September 14, with the tariffs scheduled to become effective at 12:01 that night. Moreover, the Commission's two orders clearly revealed it was essentially indifferent to the violations and was not about to enforce the statute.

[76] See *Seaboard Allied Milling Corporation* v. *United States*, 306 F.Supp. 879, 883 (W.D. Mo. 1969) and cases cited *supra* at notes 42 and 66, pages 22 and 30 respectively.

there is an even more compelling reason for immediate review where, as here, the Commission has violated *ab initio* its statutory duty.

E. The Doctrine Of Exhaustion Of Administrative Remedies Does Not Preclude Immediate Judicial Review In This Case.

Effectiveness of tariffs permeated with fourth section departures necessarily results in highly adverse consequences for the public, shippers and related interests such as sellers, merchandisers, consumers, communities, cities and states. It was precisely for the reason of avoiding such consequences that Congress enacted and subsequently strengthened the fourth section as an absolute prohibition subject to limited "special" case exceptions. Congress did not intend that aggrieved parties be required to absorb the impact of tariffs established illegally in violation of the fourth section and *later* pursue separate section 13 complaints against individual carriers. Rather the intent was to ban such ratemaking absolutely (subject to limited "special case" exceptions) to spare the public both the injury caused by such rates and the undesirable consequences of having to pursue section 13 post-effectiveness litigation before the Commission.

Petitioners misconceive respondents' position. The contention on review was not that specific rates were unreasonably high or discriminatory or that the Commission merely erred. As noted by Mr. Justice Brandeis in *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 562-563 (1919), ours was a different contention:

> "The contention is that the Commission has exceeded its powers, and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of the order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission."

Section 13, which provides any party "may" file a complaint with the Commission for violations of the Act by the carriers, is an inadequate remedy in this case for parties aggrieved by the Commission's unlawful action.[77] To require injured parties to launch separate section 13 complaints would be futile as to the unlawful action of the Commission which authorized illegal rates to be charged and collected. Parties injured but who did not pay or could not prove they bore the increases would have no remedy. Parties who did pay or bore the rates would be exposed to burdensome costs, delays, and uncertainties of pursuing multiple formal cases before the agency which by its unlawful conduct is principally responsible for the injury caused.

In cases where unauthorized fourth section departures are discovered and complaints filed, the Commission's traditional practice is to require the complainant to bear the procedural and substantive burden of proving specific damages were caused by a particular rate and that it was unlawful under *other* sections of the Act.[78] Section 13 complaint proceedings at the Commission are not available for recovery of overcharges as a result of patently illegal rates having been unlawfully assessed and collected contrary to section 4(1) requirements and procedures.[79]

[77] Section 13 is not an exclusive remedy under the statutory scheme intended by Congress. See 49 U.S.C. § 10103.

[78] *Park* v. *Louisville & N. R.R.*, 55 I.C.C. 703, 705 (1919); *New Process Gear Corp.* v. *New York Central R.R.*, 281 I.C.C. 701, 703 (1951); *Reconstruction Finance Corp.* v. *Akron, C. & Ry. Co.*, 287 I.C.C. 353, 381 (1952). Although in past cases the Commission has considered unauthorized departures to raise a presumption of unreasonableness, such a presumption can be overcome by the defending carrier. *Magnet Cove Barium Corp.* v. *Chicago, B. & Q. R.R.*, 301 I.C.C. 13, 18-19 (1957); *Hutchinson Iron & Metal, Inc.* v. *Baltimore & O. R.R.*, 316 I.C.C. 667, 670 (1962). The presumption is rebutted when the intermediate point rate does not exceed a basis the Commission recognizes as reasonable maximum. *Wertheimer Cattle Co. Inc.* v. *Chicago, B. & Q. R.R.*, 318 I.C.C. 167, 168-169 (1962).

Requiring section 13 complaints to be filed also relieves the carriers of their burden of establishing fourth section relief, contrary to the intended statutory scheme of section 4(1), and unfairly imposes a burden on shippers to prove specific damages and unlawfulness under other provisions in the Act. In addition, numerous adverse practical consequences would result:

(1) As recognized by the lower Court, to impose on the affected public the burden of pursuing a multiplicity of section 13 complaints would be unduly burdensome in this case.[80] This burden would be especially severe for individual farmers and other agricultural interests lacking adequate resources to carry the burden of prosecuting such complaints under the Commission's formal procedures.[81]

(2) Multiple section 13 complaint cases would drag on interminably at the Commission (which moves slowly in disposing of contested cases regardless of the time requirements recently imposed by the 4-R Act) and there would be the possibility of different results in different cases risking non-uniformity as to patent section 4(1) violations permeating a single rate proposal.

[79] *Vinci* v. *Cleveland, C. & St. L. Ry. Co.*, 147 I.C.C. 250, 251 (1928); *Kimberly Clark Corp.* v. *Burlington Northern*, No. 36856 (ICC Rev. Bd. No. 4, Sept. 11, 1978).

[80] There are hundreds if not thousands of affected rate points involved.

[81] There is an important practical difference between challenging a carrier's proposal where it has the burden of proof and proving damages and unlawfulness through an affirmative showing in a section 13 case. As a protestant, an affected party may be able effectively to cross examine an expert rail witness but lack the resources to provide its own expert witnesses to support an allegation of unreasonableness in a section 13 case.

(3) Section 13 complaint cases after illegal rates have been collected cannot recoup losses caused aggrieved parties forced as a result of the inter-modal impact of such rates to pay higher rates via truck and/or barge movement. Nor will such an avenue protect parties who have lost sales or have received lower sales prices because of the rates.[82]

(4) The effect of requiring individual section 13 complaint proceedings is unfairly to allow the carrier to assess, collect, and hold illegally established charges, again contrary to the intended statutory scheme.[83]

(5) Where rate tariffs are proposed requiring fourth section relief, shippers should not have to "splinter" their objections to fourth section relief and their objections under other sections of the Act, since such procedure would subject these claims "to the rigors of circumlocution" inconsistent with sound administration of the Act.[84]

In a word, to limit aggrieved parties to section 13 complaint procedures would be to deny them an effective remedy in this case.

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[82] For example, farmers sell grain at prices "backed off" by rail rates applicable from country origins to principal markets. In this case, losses of this irreparable nature have occurred and the remand will provide adequate restitution only for those affected parties who paid the illegal rates. Those parties should not be burdened with individual section 13 complaint proceedings for all the reasons cited above.

[83] In this case the Commission ordered the carrier to keep account of the charges pursuant to section 15(8)(d) but it did so solely in response to court admonishment. (A. 300, 301-302)

[84] See *A. L. Mechling Barge Lines* v. *United States*, 376 U.S. at 386.

IV

ALTHOUGH THE UNITED STATES CORRECTLY AGREES THAT THE ORDERS OF THE COMMISSION IN THIS CASE ARE REVIEWABLE, ITS INCONSISTENT SUGGESTION THAT REVIEW AWAIT COMPLETION OF SECTION 13 PROCEEDINGS WOULD VIOLATE THE STATUTORY SCHEME INTENDED BY SECTION 4(1) AND, AS A PRACTICAL MATTER, WOULD LEAVE AGGRIEVED PARTIES WITHOUT AN EFFECTIVE REMEDY

The Solicitor General's conclusion that the Commission's action is reviewable is correct and consistent with the generally accepted notion that court review should be the rule and not the exception with respect to agency determinations having a significant regulatory impact. However, the Solicitor General's concept (adopted after the lower Court's decision [85]) that review should be delayed is an anathema to proper administration of the Interstate Commerce Act, in particular section 4(1), and would, if adopted by this Court, deny aggrieved parties an effective remedy for action by the Commission contrary to or in excess of its statutory authority.

Under the theory of delayed review, the only means of correcting blatant violation of the statute by the Commission would be for aggrieved parties to pursue individual section 13 complaints, obtain unfavorable decisions, and then launch judicial review proceedings against such decisions in which the Commission's illegal action prior to or at the time of tariff effectiveness would be subject to review.[86]

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[85] The position of the United States in the lower court was that the Commission's orders were immediately reviewable.

[86] The basis for this theory appears to be the Solicitor General's unfounded assumption that a determination by the Commission to allow illegal rates to become effective is nothing more than "burden-allocation". A much more substantive impact occurred in this

The effect of the Solicitor General's suggestion would be that the ICC could continue to flaunt section 4(1), the carriers could collect and hold revenue under illegal rate proposals, and shippers and other affected parties would be left only with section 13 relief if able to establish an affirmative case, such as unreasonableness, under other sections of the Act.[87] Unsuccessful parties would have to be able to afford the delay of agency proceedings prior to raising in court the fundamental question of whether the tariffs had been illegally authorized to become effective in the first place. This type of cumbersome, costly, and time-consuming procedure is of the same variety condemned in 1964 by this Court in *Mechling*.[88]

The reasons previously given for the inadequacy of section 13 proceedings apply with equal force to the position of the Solicitor General. Where an agency violates its statute, parties adversely affected should not be required to pursue complaints before the agency prior to seeking judicial relief from statutory abuses.

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case. Tariffs *per se* unlawful under the Act were specifically authorized to become legally effective, and irreparable harm was caused the shipping public.

[87] As stressed *supra* at pages 40-42, section 13 would be unavailable to a number of parties injured by ICC action contrary to the fourth section, and they could not challenge through ultimate judicial review of section 13 decisions the Commission's illegal action. For parties who paid or could prove they bore the charges, section 13 as administered by the ICC does not allow for recovery of overcharges where rates have been illegally established in violation of the long and short haul prohibition. Finally, a cease and desist order under section 15 issued after rate effectiveness could not reach illegally assessed rates previously authorized.

[88] *A. L. Mechling Barge Lines* v. *United States*, 376 U.S. at 386 (requiring affected parties to file section 13 complaints after conclusion of a section 4 proceeding held inconsistent with sound administration of the Act and would subject such claims to the "rigors of circumlocution" deadly in the effective administrative and judicial process).

The Solicitor General is overlooking the unqualified legislative language in section 4(1). Congress did not intend that rates contrary to the fourth section be permitted or established as lawful rates absent compliance in advance of effectiveness with specific statutory requirements. Yet, this would be the precise result of the Solicitor General's theory in that the Commission could freely authorize, as it did in this case, tariffs containing unauthorized departures to become legally effective rates. The consequential impact of such an approach far exceeds the matter of individual damages suffered by individual shippers who might have the resources to pursue to conclusion individual section 13 complaints.[89]

The plausibility of the Solicitor General's suggestion as to review of discretionary Section 15(8) negative determinations in other cases is not involved in this case.[90]

V

WHETHER CONSIDERED A TERMINATION OF OR INADEQUATE SECTION 4 INVESTIGATION OF PATENT ILLEGALITY, OR FAILURE TO INVESTIGATE UNDER SECTION 15(8), THE COMMISSION'S ACTION IN THIS CASE WAS IMMEDIATELY REVIEWABLE.

In the view of these respondents, the lower court's decision was directed to the failure of the ICC to conduct an investigation of patent illegality which it should have conducted prior to authorizing the rates to become legally effective. The emphasis of the opinion is on the patent illegality issue as a substantial one raised under section

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[89] Delayed review would effectively eviscerate and render a nullity the section 4(1) prohibition, with all the undesirable consequences Congress intended to avoid.

[90] These respondents take no position on the suggestion of the United States insofar as a failure or refusal of the Commission to suspend or investigate a general revenue proposal might be involved. That issue need not be reached here.

4(1) before the Commission prior to its orders under review. As found by the lower court, the Commission did take up the merits of the allegations but failed to resolve them or make rational findings one way or the other. In a sense, the Commission, by authorizing the tariffs to become effective was terminating its pre-effectiveness investigation of patent illegality.[91] Its action was contrary to the statutory requirements of section 4(1), and, hence, immediately reviewable for reasons previously discussed.

However, if this Court were to consider the Commission's action as a refusal or failure to investigate under section 15(8), the same conclusion follows that the Commission's action was immediately reviewable.

The Commission argues that any decision not to investigate under section 15(8) is absolutely unreviewable. The error in this approach is that the Commission is attempting to interpret section 15(8) in a vacuum. Whether or not a refusal to investigate is or should be reviewable depends upon an examination of the subject before the Commission. In this case, the Commission's failure to resolve *per se* illegality was action contrary to its statutory obligation since the effect was to authorize unlawful rates to become effective contrary to the clearly stated intent of Congress.[92] According to petitioners, sus-

[91] In our view, the Court's concern was with this issue, rather than the broader question of the Commission's failure to institute a section 15(8) investigation. Comments in the decision with respect to *Asphalt Roofing Manufacturers Ass'n* v. *Interstate Commerce Commission*, 567 F.2d 994 (D.C. Cir. 1977), support this interpretation in that the court below was indicating that it disagreed with any conclusion that *all* failures to pursue an investigation are not reviewable. In other words, if, but only if, *Asphalt Roofing* were construed to stand for the proposition that the court could not review the ICC's action here, the court disagreed with that holding as too overly broad.

[92] The United States concedes that Commission action contrary to its statutory mandate should be reviewable. (Brief of United States, pp. 33-34).

pension and investigation authority are inextricably linked. If so, misuse of investigation power under section 15(8) should likewise be reviewable if misuse of suspension power is reviewable.[93]

VI

RANDOM ADDITIONAL ARGUMENTS OF PETITIONERS ATTEMPTING TO EXCUSE THE COMMISSION'S UNLAWFUL ACTION ARE FALLACIOUS.

A. The Argument That The Lower Court's Opinion Will Open The Door To Judicial Intrusion In The Ratemaking Process Wherever Tariffs Are Alleged To Be "Patently Illegal" (Brief of Commission, p. 48).

The Commission opines that any and all allegations of patent illegality raised before the Commission would necessarily result in judicial review if the Eighth Circuit's decision is affirmed. This is strictly a red herring argument since this case turned not on semantics (such as the terms "patently illegal") but on facts demonstrating conduct by the agency in bald contravention of its statute. To the extent such a situation were to recur, judicial review should be available immediately as an adequate remedy to protect the public. Affirmance of the lower Court should encourage the carriers and the Commission to observe the fourth section and its clearly stated requirements in future rate filings.

[93] *Trans Alaska Pipeline Rate Cases*, 436 U.S. at 638-9, n.17. If the Commission can abuse its statutory authority by affirmative use of the suspension power, it can equally abuse that authority by failing to investigate under circumstances where that failure authorizes illegal rates to become effective in contravention of statutory requirements. Moreover, concerns regarding judicial review of a suspension decision do not apply to review of an investigation (or non-investigation) determination.

B. The Argument That The Court Ordered Investigation Violated The Terms Of Or Interfered With Section 15(8) Procedures. (Brief Of Commission, pp. 34-35).

The Commission suggests that the court was powerless since the time normally contemplated by Congress for completion of a section 15(8) investigation expired before the Court's mandate on remand issued. According to the Commission, judicial review would upset the time table envisioned by Congress for rate investigations[94] and would interfere with other rate mechanisms contained in section 15(8).

It is ironic that the Commission, which totally ignored section 4(1) requirements by its actions in this case, now shows such concern for the Congressional scheme. Had the Commission fulfilled its statutory obligations under section 4(1), no section 15(8) timing problem would have occurred. It makes a mockery of the Interstate Commerce Act if the Commission can refuse to comply with section 4(1) and, when a reviewing court orders it to comply, then claim any investigation would be precluded by the statutory time limits of section 15(8).

Section 15(8)(a) is inapplicable to the unique circumstances of this case. The Commission did not order a hearing as to the lawfulness of the rates when published, nor did it suspend pursuant to section 15(8)(b). Through an error of law and abuse of statutory authority, the Commission allowed illegal rates to become effective, assessed and collected. Those rates should never have been permitted to become effective. Pursuant to court remand, the Commission has been ordered to cure its error of law through adequate and completed investigation of the charges of patent illegality. When those charges are confirmed through investigation, refunds are to be ordered

[94] Under section 15(8), investigations are usually to be completed within 10 months. If the investigation continues beyond that period, however, the rates go into effect automatically if suspended.

for the benefit of aggrieved shippers. Obviously this type of unusual situation was not contemplated by the 4-R Act, in particular section 15(8)(a).

The uniqueness of this case also refutes the contention that keep-account procedures of the statute would be complicated or disrupted by judicial review. From the date they were allowed to assess the charges, the railroads were required to keep account as a means to provide for refunds of overcharges pending the outcome of review. Commission ratemaking procedures will not be complicated by the decision of the Eighth Circuit.[95]

C. The Argument That The Lower Court Lacked Jurisdiction Because Allegations Of Irreparable Harm Or Injury Resulting From Patent Illegalities Were Not Made. (Brief Of Seaboard Coast Line Railroad, pp. 29-30).

Respondents demonstrated, as aggrieved parties, irreparable injury caused by the rates at issue.[96] As pre-

[95] The keep account bookkeeping obligation on the part of the railroads was imposed at the time the rates were permitted to take effect after the lower Court vacated the stay. If the situation that occurred in this case were to recur, the Commission's unlawful action would be stayed and the rates prevented from becoming effective in the first place. There would therefore be no complication with respect to keep account or other rate review mechanics. If there were any ensuing disruption, the responsibility would rest with the Commission for violating its statutory duties.

[96] The railroads incorrectly describe the court's order vacating the stay as finding that no irreparable injury would occur to respondents. The court's order rested on a balancing of equities rather than a finding against respondents on irreparable injury. Respondents, and others, had demonstrated irreparable injury from the fact that they would never be able to recoup lost sales and increased transportation charges, incurred via other modes such as truck and barge, and in the case of merchandising interests, such as farmers, reduced sales prices, all to result from the effectiveness of the rates. The conclusion to vacate the stay appears to have been based on a balancing of injury since if the railroads had ultimately prevailed after the rates expired, there would have been no way retroactively for them to have collected the increases if the

viously demonstrated by section 4 cases decided by this Court and others, proof of individual shipments by aggrieved parties has never been a prerequisite to invoking the protection of the statute.[97] See also 5 U.S.C. § 702.

Furthermore, in view of the lack of certainty as to exact points between which rail traffic will move under proposed rate adjustments containing departures, particularly tariffs involving broad territorial rate changes, it would be highly unreasonable and unfair to require an advance showing of specific harm as suggested by the railroads in order to enforce the long and short haul clause.[98]

D. The Argument That The Prohibition Of Section 4(1) Is Of No Higher Order Of Priority, And In Fact Less, Than Other Rate Lawfulness Provisions Contained In The Act. (Brief of Commission, p. 49, Brief of Southern Railway, p. 27).

The stated requirements of section 4(1) are unique in the Interstate Commerce Act and conspicuously lacking

tariffs were lawful. On the other hand, an escrow of the increases provided some measure of protection for affected shipping interests prior to a determination on the merits.

[97] *Skinner & Eddy Corp.* v. *United States*, 249 U.S. at 562-563; *A. L. Mechling Barge Lines* v. *United States*, 376 U.S. at 382-385; *Seaboard Allied Milling Corp.* v. *United States*, 306 F.Supp. at 883-884. (Flour millers successfully challenged and had set aside fourth section order where ICC had failed to make necessary section 4 findings and had failed to resolve issues of preference and discrimination raised by protest.)

[98] Access to the tariffs was limited to less than 30 days. Certain respondents purchase grain and soybeans from various locations throughout the affected territory. Others, farming interests and poultry producers, are located at literally hundreds of points affected by the rate adjustment. It was not the intent of Congressional framers of the fourth section to impose the burden on the public to demonstrate possible harm in advance of effectiveness, but rather the intent was to impose the burden on the carriers to comply with the fourth section before charging rates which contravene it.

in other sections, such as those dealing with discrimination, preference and/or prejudice. The argument also overlooks the legislative history of the fourth section and the long line of court cases interpreting this as an absolute prohibition stricter in its requirements than other rate provisions of the Act.[99]

E. The Argument That The Lower Court Did Not Review The No Reject Decision And Reviewed Only The Decision Not To Investigate Tariffs Properly Accepted For Filing. (Brief Of Commission, p. 49, n. 37).

In the opinion of the Court below, a substantial issue of patent illegality had been presented as a result of the petitions for rejection.[100] (A. 315) A failure by an agency to reject tariffs which are a substantive nullity or otherwise require advance approval prior to effectiveness is reviewable action. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 347 (1956); *Associated Press* v. *Federal Communications Commission*, 448 F.2d 1095, 1103 (D.C. Cir. 1971). The action of the reviewing

[99] The fourth section has been described by one court as "detailed, specific, prophylactic regulation, without technical language which would require expertise in the field for its interpretation." *New York Central R.R.* v. *United States*, 267 F.Supp. 619, 626 (S.D.N.Y. 1967). Another court has described tariffs containing fourth section departures as "not self executing", as compared to tariffs alleged to be unlawful under other sections of the Act. *Wirthmore Feeds, Inc.* v. *Baltimore & O. R.R.*, 221 F.Supp. 745, 747 (W.D.N.Y. 1961). Judge Friendly's helpful analysis of the history of the fourth section also demonstrates that although rate departures under the long and short haul clause might also violate the other more general antidiscrimination provisions in the Act, such rates were considered so pernicious by Congress as to warrant specific condemnation. Friendly, *The Federal Administrative Agencies: The Need For Better Definition Of Standards*, 75 Har. L. Rev. 863, 884.

[100] As noted by petitioner Seaboard Coast Line, it is apparent that the lower court was concerned with the totality of the Commission's action, including its denial of the petitions to reject. (Brief of Seaboard Coast Line Railroad, p. 18)

court is consistent with this principle since it ordered investigation and refunds if the tariffs were illegally assessed as alleged.[101]

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[101] See also *Chicago, M. St. P. & R.R.* v. *Alouette Peat Products*, 253 F.2d 449, 455-456 (9th Cir. 1957); *Middlewest Motor Freight Bureau* v. *United States*, 443 F.2d 212, 244 (8th Cir. 1970).

APPENDIX

1. 49 U.S.C. § 10726 provides:

§ 10726. Long and short haul transportation.

(a) (1) A carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I or III of chapter 105 of this title (except an express carrier) may not charge or receive more compensation for the transportation of property of the same kind or of passengers—

(A) for a shorter distance than for a longer distance over the same line or route in the same direction (the shorter distance being included in the longer distance); or

(B) under a through rate than under the total of the intermediate rates it may charge or receive equal compensation for transportation over a shorter distance than a longer distance.

This paragraph does not authorize a carrier to charge or receive equal compensation for transportation over a shorter distance than a longer distance.

(2) Notwithstanding paragraph (1) of this subsection, a carrier operating over a circuitous line or route to or from a place in competition with another carrier of the same type that operates over a more direct line or route may establish a rate (otherwise complying with this chapter) for that transportation to meet the rate of the carrier operating over the more direct line or route. A rate established for transportation over a circuitous route under this subsection is not evidence of the compensatory character of rates in other proceedings.

(b) In special cases, the Commission may authorize a carrier to charge less for transportation over

a longer distance than it charges for transportation over a shorter distance. The Commission may prescribe the extent to which a carrier authorized to charge less under this subsection may be granted relief from subsection (a) of this section. However, the Commission may not authorize a rate—

(1) to or from the more distant place unless it is reasonably compensatory; or

(2) because of potential water competition not actually in existence.

(c) A rail carrier that reduces a rate for the transportation of property in competition with a water route to or from competitive places may increase the rate only if, after a proceeding, the Commission finds that the increase is proposed because of a change in conditions other than the elimination of water competition.

(d) The Commission shall begin a proceeding under subsection (b) of this section on application of a carrier. A carrier may file a proposed rate with its application, and if the application is approved, the Commission shall allow the rate to become effective one day after the approval becomes effective.

2. Former section 4(1) of the Interstate Commerce Act, 49 U.S.C. § 4, provided:

§ 4, par. (1). Charges for long and short hauls and on through routes; exemption

It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within

the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter or chapter 12 of this title, but this shall not be construed as authorizing any common carrier within the terms of this chapter or chapter 12 of this title to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided* further, That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this chapter or chapter 12 of this title and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further*, That tariffs proposing rates subject to the provision of this paragraph requiring Commission authorization may be filed when application is made

to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice: *And provided further*, That the provisions of this paragraph shall not apply to express companies subject to the provisions of this chapter, except that the exemption herein accorded express companies shall not be construed to relieve them from the operation of any other provision contained in this chapter and chapter 8, 12, 13 and 19 of this title.

INTERSTATE COMMERCE COMMISSION

FOURTH SECTION APPLICATIONS FOR RELIEF

March 17, 1978.

These applications for long- and short-haul relief have been filed with the ICC.

Protests are due at the ICC on or before April 6, 1978.

FSA No. 43519, Western Trunk Line Committee, Agent's No. A-2748, rates on grain and grain products, from, to, and between points in southwestern and western trunk line territories, in Sup. 253 to its tariff 120-L, ICC A-4868, and in other agency and individual lines' tariffs named in the application, to become effective April 12, 1978, and later. Grounds for relief —revised rate structure.

FSA No. 43520, Southwestern Freight Bureau, Agent's No. B-737, rates on hexamethylene diamine solution, from stations in Texas to Waynesboro, Va., in Sup. 11 to its tariff 11-I, ICC 5300, to become effective April 12, 1978. Grounds for relief—market competition.

FSA No. 43521, Traffic Executive Association-Eastern Railroads, Agent's E.R. No. 3067, rates on soda ash, from East St. Louis, Ill., and St. Louis, Mo., to Fairmont, W. Va., in Sup. 305 to its tariff 400-S, ICC C-382, to become effective April 15, 1978. Grounds for relief—water-truck competition.

FSA No. 43522, Traffic Executive Association-Eastern Railroads, Agent's E.R. No. 3066, rates on newsprint paper, from Saint John, N.B., Canada, to stations in Florida, Georgia, and South Carolina, in Sup. 84 to Canadian Freight Association tariff 760, ICC 325, to become effective April 23, 1978. Grounds for relief—water competition.

By the Commission.

H. G. HOMME, JR.,
Acting Secretary.

[FR Doc. 78-7578 Filed 3-21-78; 8:45 am]

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